1958

State of Utah v. Jack Keeley : Brief of Respondent

Utah Supreme Court

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In the

Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JACK KEELEY,
Defendant and Appellant.

Case No.
8828

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On the 24th of October, 1957, the defendant was convicted in the District Court in and for Salt Lake County, of the crime of Assault with Intent to Commit Rape.

At the time of the commission of the offense the prosecutrix was 10 years of age and the defendant was the girl's stepfather. At the trial only the prosecutrix and the defendant testified. Testimony of the girl's school teacher taken at the preliminary hearing was admitted. The errors raised

on appeal relate to the Court's permitting an adult to sit near the prosecuting witness when she testified, and to the exclusion of certain evidence.

STATEMENT OF POINTS

POINT I.

IT WAS NOT ERROR FOR THE TRIAL COURT TO PERMIT AN ADULT PERSON TO SIT NEAR THE PROSECUTING WITNESS WHILE THE LATTER TESTIFIED.

POINT II.

THE COURT DID NOT ERR IN GRANTING A MOTION TO STRIKE TESTIMONY OF THE DEFENDANT RELATING TO A PHONE CONVERSATION WITH THE MOTHER OF A FRIEND OF THE PROSECUTING WITNESS.

ARGUMENT

POINT I.

IT WAS NOT ERROR FOR THE TRIAL COURT TO PERMIT AN ADULT PERSON TO SIT NEAR THE PROSECUTING WITNESS WHILE THE LATTER TESTIFIED.

At the commencement of trial the Court over objection permitted a Mr. Egginton, an adult person, acquainted

with the prosecuting witness, to sit near her while she testified, she being a 10 year old girl.

The following from pages 25 and 26 of the transcript is quoted:

> "MR. RONNOW: I will have Mr. Don Egginton, an employee of the Salt Lake City School System to stand by her, or sit by her on the witness stand.
>
> "MR. BARCLAY: I object to that. I object to him even being in the court.
>
> "THE COURT: I am going to permit the man to sit over here with the understanding he will say nothing to the child or make no indication as to any answers that are to be given, merely for that purpose and because of the child's age.
>
> "MR. BARCLAY. All right, your Honor."

It is submitted that appellant's point falls on either of the following two grounds: First, counsel for the defendant at trial waived his objection to the adult being seated near the witness. It is noted from the above quoted portion of the transcript that an initial objection was made, but then after the Court allowed Egginton to sit near the witness, counsel said, "All right, your Honor." He thereby consented to the Court's ruling and waived his original objection.

Second, the Court's ruling did not constitute error. The record does not reveal the exact position of Mr. Egginton with relation to the witness. However, the following information was obtained from conversing with the District Attorney, Mr. Ronnow, from Mr. Barclay, defendant's

counsel at trial and from Mr. Egginton. Trial was had in the Honorable Judge Stewart Hansen's Courtroom and there the witness chair is elevated several feet above the floor level. At the time the prosecuting witness testified Mr. Egginton was seated in a chair on the floor level to the left and slightly to the rear of the witness. Estimates vary as to the distance between the witness and the adult from 3 to 6 feet. The witness could not see Egginton unless she turned her head to the extreme left.

The only case we have been able to find presenting a similar factual circumstance is *Evers* v. *State* (1909 Neb.), 121 N. W. 1005. The full statement by the Supreme Court of Nebraska discussing the problem there is quoted in appellant's brief on pages 8 and 9. There the prosecuting witness in a rape conviction was a girl eight years of age. Over objection the trial court permitted an adult woman, (a Mrs. Wheeler) a friend of the child, to sit on the stand while the child testified. It appears that the adult was seated about 6 inches from the witness. It is interesting to note that in the *Evers* case counsel objected that the adult woman was prompting the witness. The trial court overruled the objection but cautioned that she was not to suggest. The appellate court found no error for the reason that there was nothing in the record to indicate "that Mrs. Wheeler ever again if she had previously, disregarded the admonition of the court." There is no indication in the instant case that Mr. Egginton ever suggested or prompted the witness. Here the objection merely goes to the presence of the adult near the witness.

An earlier Nebraska case, although not so similar factually as is the *Evers* case, bears on this problem. In

Gould v. *State* (1904 Neb.), 99 N. W. 541, a conviction for child stealing, the defendant assigned error because the father of the child, a girl 15 years of age, was permitted to sit near the child facing her when she testified. Defendant alleged that this was prejudicial. The Court affirming the conviction found no error on the ground that there was no showing that the father's conduct was improper or that the testimony of the daughter was in any way affected by the father's presence.

Here there has been no showing that the presence of Egginton influenced the testimony of the prosecuting witness, or that Egginton in any way attempted to coach or prompt the witness. The Court permitted the seating arrangement because of the child's age and with the understanding that the adult would say nothing to the child. Appellant accepts the principal of the *Evers* case, supra, but seeks to distinguish the instant case with the argument that the adult here was the first person to whom the child revealed the incident. That contention does not have substantial merit. The child was undoubtedly frightened and nervous and it may not have been possible to ellicit her testimony unless someone was seated near her. This was likely this child's first experience in a court proceeding. Testifying at a trial is often a frightening experience even for an adult; it would be more upsetting to a 10 year old girl. The presence near her of an adult with whom she was acquainted gave her sufficient confidence and self-assurance to speak. Appellant contends that the presence of Egginton prompted the child to make her testimony consistent with the description of the incident as she had

related it to him, earlier. But this assumes that her testimony was false. Most every witness who testifies at trial has related his story to someone (usually one of the attorneys) prior to the time of the trial and there is always the desire to be consistent. The logical result of applying appellant's argument would be to bar every person from the courtroom who had previous to trial heard the witness' story. It is submitted that whether the adult is seated near the witness on the stand, or on the front row of the courtroom benches is not significant.

In a recent case, *Robinson* v. *State* (1953 Ala.), 71 S. 2d 843, the Court of Appeals of Alabama, spoke of the trial court's discretionary powers to deal with circumstances of the nature before the Court here. That was a conviction for carnel knowledge, and while a 7 year old boy, a brother of the prosecutrix, was testifying, there was some indication that the boy's father seated in the courtroom was signaling answers to the boy by nodding his head each time a question was asked. The Court denied error and said at page 845:

> "In situations such as is here presented it is well settled that since the trial court had the opportunity to see and hear everything that transpired, of necessity, much must be left to his sound discretion and his rulings will not be disturbed unless it clearly appears that such discretion has been abused."

The above cited rule may be well applied to this case. The trial court saw the circumstance at first instance; he was able to observe the attitude and reaction of the young

girl and he was able to observe whether the adult attempted to influence or direct the answers of the witness. There was no showing that he had done so.

POINT II.

THE COURT DID NOT ERR IN GRANTING A MOTION TO STRIKE TESTIMONY OF THE DEFENDANT RELATING TO A PHONE CONVERSATION WITH THE MOTHER OF A FRIEND OF THE PROSECUTING WITNESS.

On pages 72 and 73 of the transcript it is shown that at a point during trial the District Attorney moved that testimony as to a certain phone call be stricken. The Court granted the motion. Appellant argues that this constituted error. The objection and motion to strike came during the direct examination of defendant; counsel was seeking to show by relating specific instances that the prosecuting witness had a past history of lying. Defendant had been testifying of various instances when the young girl had told falsehoods. The following, quoted from the transcript at pages 72 and 73, during the direct examination of defendant, reveals the nature of the objection: (Ruth is the Prosecutrix.)

> "A. A telephone call came from, well, from the mother of a little girl.
>
> "Q. Don't tell what she said. Did you talk to your little girl about what this lady had said to you?
>
> "A. I don't believe I quite understood your question, sir.

"Q. Did you talk to the little girl?

"THE COURT: To Ruth.

"Q. (By Mr. Barclay) To Ruth about what this lady had said to you about the birthday party?

"A. Yes.

"Q. What did you say to her, to Ruth?

"MR. RONNOW: I object on the grounds this line of questioning is incompetent, irrelevant and immaterial. Rather, this is not impeachment, and this man cannot attack the truth-telling qualities of this child by specific instances, none of these episodes here that he was setting up in cross-examination. It is improper impeachment.

"MR. BARCLAY: I am not trying to impeach anybody. I am just trying to tell the truth. This is the evidence.

"MR. RONNOW: Not about a birthday party; not about a phone call.

"THE COURT: Yes.

"MR. RONNOW: Did he ask her on cross-examination about a phone call?

"THE COURT: About a birthday party.

"MR. RONNOW: What about a phone call?

"THE COURT: Yes, sir.

"MR. BARCLAY: I think I did, because I had this list here and went down it.

"THE COURT: I know he asked her about a birthday. I don't think the phone call is the important thing, but I think it is proper so far as it relates to the birthday party.

> "MR. RONNOW: I have no memory of any cross-examination on the phone call. I move that be stricken as improper impeachment.
>
> "THE COURT: That may be stricken, that part."

Previous to this discussion the defendant testified of other instances when the prosecuting witness had related false stories.

It is noted that as to the other instances of lying related by the defendant, the prosecuting witness had been cross-examined, but as to the instance of the telephone call there had been no cross-examination by defendant's counsel at trial. The District Attorney's objection was on the basis that it was not proper to attack the truth-telling qualities of this child by evidence of specific instances. Appellant argues in his brief that the admission of the defendant's testimony regarding specific instances of lying by the prosecuting witness is proper whether or not the witness was cross-examined relative to the instances. It is submitted that such is not the rule. The following is quoted from Wharton's Criminal Evidence, 12th Edition, Section 931.

> "The impeaching testimony must be confined to the general reputation of the witness or to the relevant trait of character, and proof of specific acts will not be received."

And from Section 927, the following:

> "A witness may be discredited by evidence attacking his character or reputation for truth, even though evidence has not been given to sustain the

> reputation. *Proof of particular instances of untruthfulness is not admissible.*" (Emphasis supplied.)

For support of the rule, see *Rau* v. *State* (1919 Md.), 105 Atl. 867.

Appellant on page 17 of his brief refers to Wigmore's attitude that so far as a woman-complainant of a sex-offense charge is concerned an exception should be made admitting evidence of specific instances of misconduct. But it is noted that after suggesting such a rule Wigmore concedes that:

> "* * * By most courts no exception is made for this type of witness."

See Wigmore on Evidence, 3rd Edition, Section 979 (4).

It is submitted that in any event the exclusion of such evidence did not prejudice defendant's rights. The Court permitted defendant to testify as to six other instances when he claimed the prosecutrix lied. See transcript pages 68 to 78. The striking of or refusal to permit testimony as to a seventh instance certainly did not wreck defendant's strategy or cause him prejudice.

CONCLUSION

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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